IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1651

SEATRAIN SHIPBUILDING CORPORATION

and

POLK TANKER CORPORATION,

Petitioners,

v.

SHELL OIL COMPANY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENTS ALASKA BULK CARRIERS, INC. AND TRINIDAD CORPORATION IN OPPOSITION

FRANCIS BALLARD
BALLARD, SPAHR,
ANDREWS & INGERSOLL
United Engineers Building
20th Floor
30 South 17th Street
Philadelphia, Penn. 19103
(215) 564-1800

ALAN G. CHOATE
PEPPER, HAMILTON
& SCHEETZ
123 South Broad Street
Philadelphia, Penn. 19109
(215) 545-1234

AMY LOESERMAN KLEIN
OLGA BOIKESS
WILLIAM KARAS
MORRIS GARFINKLE
GALLAND, KHARASH,
CALKINS & SHORT
1054 Thirty-First Street, N.W.
Washington, D.C. 20007
(202) 342-5200

Attorneys for
Alaska Bulk Carriers, Inc.
and
Trinidad Corporation.

Washington, D.C. • THIEL PRESS • (202) 638-4521

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1651

SEATRAIN SHIPBUILDING CORPORATION

and

POLK TANKER CORPORATION,

Petitioners,

v.

SHELL OIL COMPANY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENTS ALASKA BULK CARRIERS, INC. AND TRINIDAD CORPORATION IN OPPOSITION

Respondents Alaska Bulk Carriers, Inc. ("ABC") and Trinidad Corporation ("Trinidad") own U.S. flag tankers built without government subsidy and operate these tankers in U.S. coastwise and intercoastal ("domestic") trades. Petitioners Seatrain Shipbuilding Corporation ("Seatrain") and Polk Tanker Corporation ("Polk") had obtained the consent of the Secretary of Commerce to waive the statutory bar against operation in the domestic trades of one vessel built with government subsidy,

the T.T. STUYVESANT, so as to permit that vessel to operate without limitation in domestic trades. Petitioners seek review and reversal of the decision by the Court of Appeals for the District of Columbia Circuit that such a waiver was prohibited by the Merchant Marine Act, 1936.

QUESTION PRESENTED

Did the Court of Appeals properly interpret Section 506 of the Merchant Marine Act, 1936, 46 U.S.C. §1156, as barring the Secretary of Commerce/Maritime Administration from granting an unlimited waiver for the operation of vessels built with construction differential subsidy for use in domestic trades?

STATEMENT OF THE CASE

Seatrain contracted to build for affiliated corporations a series of four very large oil tankers for use in the foreign commerce of the United States (R. 13, pp. 2-3). All four tankers were constructed with Construction Differential Subsidy ("CDS") granted by the Maritime Administration, an agency of the Department of Commerce, under Title V of the Merchant Marine Act of 1936 (R. 13, pp. 3-4, App. A at 8a.)[1] Title V is designed to promote construction of vessels in United States shipyards by equalizing, by direct government subsidy, the cost of construction of vessels in U.S. shipyards with such cost in foreign shipyards, so as to enable U.S. - built ships to compete with foreign-built ships in the foreign trade and promote the U.S. shipbuilding industry (App. A at 67a). CDS is available only for vessels which will be used in foreign commerce, since vessels used in domestic commerce suffer from no foreign competition (App. A at 6a). When CDS was awarded for the first two Seatrain tankers, those tankers were committed for long-term operations in foreign commerce. When CDS was awarded in 1972, however, for the third tanker built for Polk, the STUYVESANT, that vessel had no commitment for any employment (App. A at 9a).

[1] The Maritme Administration and the Secretary of Commerce are referred to herein collectively as "the agency."

Construction of the STUYVESANT and the fourth vessel in the series, the BAY RIDGE, was halted in 1975 when a severe downturn in the demand for crude oil tankers in foreign trade made prospects of employment problematical for these last two vessels, which were built on speculation (App. A. at 9a-10a, fn. 15). Construction of the STUYVESANT then recommenced when Standard Oil Company of Ohio ("Sohio") agreed to charter the STUYVESANT for *three years* in the *domestic* trade (*Id.*), and the vessel was completed in 1977. In addition to the CDS of $27.2 million given by the agency to the shipyard, the agency also guaranteed, under Title XI of the Merchant Marine Act, $30.2 million of loans to finance the construction of the vessel, and the Economic Development Administration ("EDA"), another agency of the Commerce Department, granted a $5 million loan to Seatrain and guaranteed 90 percent of an additional $82 million of private loans to Seatrain for the purpose of maintaining the yard constructing the STUYVESANT and the BAY RIDGE (App. A at 8a-9a).

The first *public* notice of the Sohio agreement to use the STUYVESANT in the domestic, Alaskan oil trade came two years later when, on July 8, 1977, Polk filed with the agency an application for a "three-year waiver" of the restrictions imposed by Section 506 of the Merchant Marine Act, 1936, so that it could timecharter the STUYVESANT to Sohio for three years to carry oil

from Alaska to the Continental United States (App. A at 10a). Section 506 requires that "[e]very owner of a vessel for which a construction-differential subsidy has been paid shall agree that the vessel shall be operated exclusively in foreign trade, . . . " but permits the agency to consent to the "temporary transfer" of vessels built with CDS to trades other than foreign trades only "for periods not exceeding six months in any year," and only when the agency determines "that such [temporary] transfer is necessary or appropriate to carry out the purposes of [the Merchant Marine] Act" (App. A at 122a-23a).[2] The agency nevertheless assigned petitioners' application a Docket number, S-565, and on July 19, 1977, published notice of the application in the *Federal Register*, 42 Fed. Reg. 37,299 (1977). Numerous comments in opposition to the application were filed, all pointing to the agency's lack of statutory authority to deviate from the terms of section 506 of the Act (App. A at 10a-11a).

While the application for a "three year waiver" was pending, the agency held several *ex parte* meetings with petitioners and eventually accepted a proposal submitted by Polk that the agency release the restrictions of the subsidy contract under which the STUYVESANT was constructed, thereby permitting operation of the vessel in the otherwise prohibited domestic trades, upon Polk's execution of a 20-year promissory note (payable in 40 semiannual installments) for the amount of the $27.2 million CDS (App. A at 11a). The agency did not notice this new proposal in the *Federal Register*, but instead confirmed its approval of Polk's proposal by two letters to Polk, both dated August 31, 1977 (*Id.*). One of the

[2]The full text of section 506 is set forth in the Appendix at the pages cited.

letters and a press release subsequently issued by the agency stated that approval of the Polk proposal was given because the continued operation of Seatrain was in jeopardy, which in turn meant that it might default on its obligation to the various agencies of the Department of Commerce (R. 1, Exhibits B-1, C).[3]

In September, 1977, respondents ABC and Trinidad, and respondent Shell Oil Company ("Shell") filed a complaint seeking district court review of the agency actions with motions for temporary and preliminary injunctive relief. A temporary restraining order was issued on September 22, 1977; preliminary injunctive relief was denied on September 30, 1977 principally on the ground that plaintiffs had failed to show immediate irreparable injury (App. A at 12a, R. 21, pp. 3-4). Following the denial of the motion for preliminary injunction, the transactions involving the STUYVESANT were "closed" (App. A at 12a). These transactions included the transfer of ownership of the vessel without any restriction against use in domestic trades, the making of additional irrevocable Government financing guarantees, and a three-year charter of the vessel for use in the carriage of oil from Alaska to the Continental United States (App. A at 71a).

Discovery proceeded on an expedited schedule and the parties filed cross-motions for summary judgment (App. A at 12a, and at 12a, fn. 22). The trial court issued an opinion and order on November 22, 1977 (App. A at 65a-95a) which (1) granted the motions of ABC, Trinidad, and Shell for summary judgment on the ground that the permanent waiver had been granted without any consideration of the competitive effects thereof and there-

[3]Subsequently, the agency dismissed its docketed proceeding S-565.

fore in violation of the Administrative Procedure Act,[4] and remanded the case to the agency for such consideration;[5] (2) denied the motions of ABC, Trinidad, and Shell for summary judgment on the issue of the agency's lack of legal authority to grant permanent waiver and granted the agency's and petitioners' motions for summary judgment sustaining the agency's legal authority; and (3) denied the agency's and petitioners' motions for summary judgment on another claim of procedural irregularity and retained that issue for disposition by the Court (App. A at 94a-95a). By further order entered on November 30, 1977, the trial court dismissed the remaining pending claim and entered final judgment with respect to all claims decided by the Court (R. 53).

Appeals from the trial court's decision were filed in the United States Court of Appeals for the District of Columbia Circuit, and the Court of Appeals rendered its decision on February 6, 1979 (App. A at 2a). The Court of Appeals reversed the trial court's decision, holding that the agency's actions were beyond its statutory authority (App. A at 51a). A dissenting opinion, filed by Judge Bazelon, would have sustained the judgment of the trial court (App. A at 60a-61a). Seatrain, Polk, and the agency petitioned for rehearing with a suggestion for rehearing *en banc*; these petitions were denied, the latter by the full court,[6] with Judge Bazelon

[4]The trial court held that the protection of unsubsidized vessels from unfair competition by subsidized vessels was "one of the cornerstones of the statutory scheme" (App. A at 92a).

[5]The trial court did not, however, enjoin the operation of the STUYVESANT in domestice trade during the period of remand, and the vessel continued its operations in the Alaskan trade.

[6]The original order denying the suggestion for rehearing *en banc* filed March 22, 1979, shows consideration by the entire [footnote continued]

noted as in favor of granting both petitions (App. A at 62a-64a).

On March 29, 1979, Seatrain, Polk and the agency filed with the Court of Appeals a petition for a stay of the mandate pending application to this Court for a writ of certiorari. That motion was granted on April 19, 1979 but the stay was ordered only through May 1, 1979. The petition herein having been filed on April 30, 1979, the stay is still in effect, and the STUYVESANT continues to operate in the domestice trade, as it has since October, 1977.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I.

THE DECISION BELOW WILL HAVE NO SIGNIFICANT IMPACT ON THE ADMINISTRATION OF THE FEDERAL MARITIME PROGRAM

Petitioners predicate the need for review and reversal of the decision below on the claim (p. 10) that the decision has a significant impact on the future of the federal maritime program in addition to its "staggering economic consequences" to petitioners.[7] Yet the claim

court, with only Judge Bazelon recorded as in favor of a rehearing *en banc* (App. A at 63a-64a). An amendment to that order was later filed showing that Judge Levanthal did not participate in the decision on the suggestion for rehearing *en banc* (Order, 4/3/79).

[7]Petitioners make no claim that the Court of Appeals decision conflicts with any decision of any other district or appellate court, or any decision of this Court. The petitioners' statement (p. 10) that of the four federal judges who have considered the case there has been an even split is not precise. There was a majority *appellate* decision against petitioners' position, and there was a 7-1 *appellate* decision not to reconsider the majority opinion.

of national importance rests solely on the inhibition of "flexibility" and "discretion" allegedly needed by the agency. The agency has the flexibility, under section 506 of the Act, in its discretion and for the proper statutory reasons, to waive the restriction against operation by CDS vessels in domestic trades for six months in any one year or, indeed, from year to year. If the agency needed "flexibility" and "discretion" in administering the national maritime program beyond that conferred by section 506, the powers which the Court of Appeals held were unlawfully exercised here by the agency would presumably have needed considerable flexing during the 43-year implementation of that program. But in the 43 years since the Merchant Marine Act was passed, this is the first and only instance in which the agency has attempted to go beyond the six-month waiver authority conferred by section 506 and waive the restriction against unlimited operation in the domestic trades by vessels built with CDS.[8] The waiver here was for one vessel for the stated purposes of rescuing both (1) the vessel's owners from the consequences of building a vessel for foreign trade which, due to changes in market conditions, was no longer profitable; and (2) the government from the financial consequences of repeatedly

[8]Once, and only once, before was this issue even concretely posed to the agency, and that was in 1964 for a waiver in respect of two "Grace Line vessels" originally built unsubsidized, later converted with use of subsidy funds for foreign trade, and then contracted for sale to operators in the domestic trade, (App. A at 29a-31a). The agency determination to waive the restrictions for the Grace Line vessels was not opposed by other operators, was not judicially tested, and was based on an interpretation by the Comptroller General of Section 506 of the Merchant Marine Act which was repudiated by the trial court and by petitioners here (App. A at 32a).

granting financial assistance to a private venture which had become, and perhaps always was, not viable.

The Merchant Marine Act, 1936, explicitly says that CDS may be granted only for vessels built for foreign trade and that the agency may allow such vessels to be used in domestic trade only for six months in any year. The Court of Appeals' decision held that the Merchant Marine Act, 1936, meant what it says and thus confirmed the bar against permanent operation of vessels built with CDS in the domestic trades, a bar that has been relied on by all segments of the merchant marine industry who have planned the operation of their businesses according to these fundamental statutory precepts.

Thus petitioners' claim (pp. 11-12) that the decision below curtails "flexibility" and "discretion" needed by the agency is contradicted by the fact that the merchant marine industry has been observing the statutory rules of the road as interpreted by the Court below since the statute was passed. Petitioners' effort to elevate its singular predicament into an event of national importance for the purpose of obtaining this Court's review is unfounded.[9]

II.

THE DECISION BELOW WAS CORRECT.

Even were petitioners' problem of more general significance, the Court of Appeals decision would still not merit this Court's review because that decision was correct. By scrupulously analyzing the statute and its legislative

[9]*See* Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 74 (1955) holding that to merit the attention of this Court, a problem must reach "beyond the academic or episodic."

history and answering every condition advanced again here by petitioners, the Court of Appeals showed that petitioners' construction of that statute contravenes its language, its intent, and the policies which it was designed to promote. The challenges repeated here were all conclusively and correctly answered by the Court of Appeals.

A. The Secretary's Authority (Petition, pp. 12-14).

Petitioners concede (p. 12) that the Act does not authorize "*en haec verba*" the agency to lift the bar against permanent operation in domestic trades of vessels built with CDS. Petitioners refer to sections 504 (App. A at 122a) and 207 (App. A at 99a) as evidence of the "broad" discretionary powers conferred on the agency with respect to the subsidy program. The Court of Appeals considered these sections and correctly concluded that neither section authorizes the agency to override express statutory commands (App. A at 39a-43a).[10] Thus if lifting of the bar against CDS built vessels for domestic trade is, as the Court of Appeals held, prohibited by section 506 of the Act, citations to general statutory powers conferred upon the agency do not advance petitioners' argument.

---

[10] As the Court of Appeals stated (App. A at 39a, fn. 100), the government concluded that section 504 does not even address the issue of amending subsidy contracts, and the section speaks of limiting restrictions in the necessary documents to those required by law (App. A at 40a). The restriction against use of the STUYVESANT in the domestic trade was written into the CDS contract itself and provided that such restriction would "run with the title to the Vessel." (App. A at 14a, fn. 26). Section 207 was held no more than "a 'housekeeping statute,' and a similar provision is found in nearly every administrative agency basic statute." (App. A at 41a-42a).

B. Section 506 Of The Act (Petition, pp. 14-20).

The Court of Appeals meticulously examined the language (App. A at 13a-19a), the legislative history (App. A at 19a-29a), and the administrative interpretation (App. A at 29a-36a) of section 506 and concluded that it did, and was intended to, bar the waiver which the agency purported to grant petitioners. Petitioners' arguments do not detract from the Court of Appeals' analysis.

Petitioners claim (p. 15) that the restriction of section 506 attaches only while a vessel "retains the financial benefits of the subsidy." That is not what the statute says. The statute says that:

> "Every owner of a vessel for which a construction-differential subsidy has been paid shall agree that the vessel shall be operated exclusively in foreign trade. . . ." (App. A at 13a)

There is no statutory mechanism permitting an owner to "buy" a waiver of the restriction against use of the vessel in domestic trades for a payback of subsidy *except* one:[11]

> "The Commission may consent in writing to the temporary transfer of such vessel to service other than service covered by such agreement for periods not exceeding six months in any year, whenever the Commission may determine that such transfer is necessary or appropriate to carry out the purposes of this Act." (App. A at 123a)

---

[11] Another "exception" contained in section 506 pertains not to continuous use of the vessel in domestic trade but allows certain intercoastal carriage of cargo on described foreign voyages (App. A at 14a-15a, 122a-23a).

As the Court of Appeals held, this exception excludes other exceptions (App. A at 15a-16a) and especially excludes the construction urged by petitioners here, which is that the recipient of the subsidy may exhange all or a proportion of the subsidy in return for a total or a proportionate lifting of the statutory bar. As the Court of Appeals stated, the bar, once imposed, runs with the life of the vessel:

> "The idea is one of permanence; once the ship has been constructed by Government assistance of up to 50% of its original construction cost, the ship is dedicated to the U.S. foreign trade." (App. A at 14a)

Petitioners' legislative history argument (pp. 15-17) rests principally on the contention that a 1938 amendment to section 506 confirmed the interpretation that the statutory bar is waivable upon agency agreement to accept a payback of subsidy.[12] As the Court of Appeals' decision painstakingly shows, the 1938 amendment is the strongest possible evidence that Congress intended to and did include in section 506 the only exception to the continuous use in domestic trades of vessels built with CDS--an exception limited to six months in any year. Thus section 506, as originally enacted, was ambiguous in that it seemed to refer to two cases in which vessels built with CDS could operate in domestic trades: (1) upon "the written consent of the Commission so to operate [and

[12]While the petition speaks (pp. 11-12) of "vessels that once received but have remitted their subsidy," Seatrain has not remitted its subsidy: it merely promised to do so over the economic life of the vessel. The issue of whether such a promise was equivalent to payback was not reached by the Court of Appeals since it held that the agency lacked power to waive statutory restrictions whether or not subsidy was in fact repaid.

the proportionate repayment of subsidy]" and (2) "If an emergency arises which, in the opinion of the Commission, warrants the temporary transfer of a vessel" but for no longer than three months (App. A at 22a). Upon testimony by the then Maritime Commission Chairman that the section was ambiguous in that the Commission did not know whether waivers were restricted only to cases of emergency and then to periods of three months (App. A at 24a-25a), or whether other and longer waivers were permitted provided there was a proportionate subsidy repayment, the statute was amended to specify that waivers may be given by the agency, without reference to findings of "emergency," but for no longer than six months in any year, and with proportionate payback of subsidy. This change was explained by the same Maritime Commission Chairman as conferring power upon the Commission to consent to operation in domestic trade (other than domestic portions of worldwide voyages) but such consent was "limited to six months in any one year" (App. A at 26a) and that explanation is found in both the Senate and House Reports which accompanied the 1938 bill amending section 506 (*Id.*).

Petitioners' reliance on the legislative history of the 1938 amendment refers not to this direct evidence of the reason for the amendment -- a reason specifically applicable to petitioners' claim that the agency may grant waivers for longer than six months in any year -- but instead weaves an argument that Congress' deletion of the only language which might have given the agency the power to grant permanent waivers was somehow evidence of an intent to confirm this power, provided only that subsidy payback is made in proper proportion to waiver (Petition, pp. 16-17). The support for that construction

is said to lie in the fact that the unsubsidized operators opposed the 1938 amendment (Petition, p. 17). Indeed they did, because they urged that Congress prohibit the agency from granting *any* waiver, even a temporary one, of the bar against use of vessels built with CDS in the domestic trades.[13] The unsubsidized operators were unsuccessful in this attempt, and the balance was struck in favor of permitting the agency to waive the bar but for no longer than six months in any year.

The alleged consistent interpretation of the Act by the agency (Petition, pp. 17-20) do not withstand analysis as shown by the Court of Appeals' discussion of each of them (App. A at 29a-36a). Indeed, as the Court of Appeals' opinion shows, the agency construed the statute as we do in denying, in 1970, a request by the parent of Seatrain to include in the subsidy contract the option to waive the statutory bar upon repayment of subsidy (App. A at 33a-34a).

C. The Purposes And Policies Of The Act (Petition, pp. 20-25.)

Petitioners claim that the waiver they secured from the agency is necessary to further two broad purposes: (1) competition[14] and (2) recognition of discretion in the

---

[13] *Amending the Merchant Marine Act, 1936: Hearings on S. 3078 Before the Senate Committees on Commerce and Education and Labor, Part 2*, 75th Cong., 2d. Sess. 44 (1937).

[14] Petitioners interest in competition was not so evident when it sought to preclude ABC, Trinidad, and Shell from securing consideration by the agency of the competitive effect of the waiver by arguing that its competitors had no standing to challenge agency actions. Thus petitioners defended against the one successful challenge in the trial court – the failure of the agency to even consider the competitive effect of the waiver -- by arguing that its competitors lack standing to secure that judicial relief. The standing argument was raised again to the Court of Appeals by petitioners cross-appeal from the trial court's decision, but appears to have been abandoned here.

agency to carry out the purposes and policies of the Act. Petitioners predicate (pp. 7, 24-25) the "need" for competition in the Alaskan oil trade on an alleged public interest in providing additional tonnage for that trade. But as the Court of Appeals plainly showed, the Government conceded that it could not make a finding that long-term competition from subsidized vessels was needed to alleviate any undertonnaging in the Alaskan oil trade, and such finding cannot be made for any trade:

> ". . . a finding of need and no competitive effect resulting from the entry of a subsidized vessel into the entire U.S. domestic trade for the permanent life of the vessel -- a period in excess of 25 years -- is a finding impossible to make. No Government agency or private enterprise can logically make a finding of need for this or any other vessel for its entire life." App. A at 17a-18a.

Indeed, as the Court pointed out, the agency itself had said in early 1978 that it could not predict supply and demand of tankers in the Alaskan oil trade beyond 1980 (App. A at 18a, fn. 34). Thus the impossibility of making long-range predictions to support a lifetime waiver of the statutory bar confirms the wisdom of the statutory limitation of such waivers to six-month periods.

The Court of Appeals specifically considered the competitive effect of its decision (App. A at 49a-51a), and concluded that the long-term competitive goals of the Act would be impeded by allowing the competition of the STUYVESANT, a vessel built with CDS for foreign trade, into the domestic trades, hitherto served by vessels built for the domestic trades without CDS. In considering the argument that the agency needs permanent waiver authority to promote competition in domestic trades. the Court of Appeals looked beyond the Alaskan oil

trade to the whole shipbuilding and ship-operating industry, and concluded that the permanent waiver authority petitioners would imply into the Act would inhibit long range competition because of the market uncertainty thereby introduced (*Id.*). Thus in these industries, which require the commitment of huge capital resources, there is a particular need to understand the legal framework in which Government aid may play a part (App. A at 49a-50a, and see R. 2, pp. 1-5). The permanent waiver authority exercised here for the first time in 43 years for a vessel built for foreign trade with CDS introduces "into the domestic portion of our maritime trade a totally variable and incalculable factor" (App. A at 50a) -- a factor which the Court of Appeals concluded "would inevitably have a depressive impact on the future of American shipbuilding and ship operations by American owners" (App. A at 50a-51a). Contrary to petitioners' claims, the Court of Appeals gave full weight to the competitive policies of the Act, and correctly determined that these policies would be undermined were petitioners afforded relief from their commitment to operate the STUYVESANT in foreign trade.

CONCLUSION

For the reasons set forth above, respondents Alaska Bulk Carriers, Inc. and Trinidad Corporation respectfully submit that the Petition For a Writ of Certiorari should be denied.

Respectfully submitted,

AMY LOESERMAN KLEIN
OLGA BOIKESS
WILLIAM KARAS
MORRIS GARFINKLE
GALLAND, KHARASH,
CALKINS & SHORT
1054 Thirty-First Street, N.W.
Washington, D.C. 20007

FRANCIS BALLARD
BALLARD, SPAHR,
ANDREWS & INGERSOLL
30 South 17th Street
Philadelphia, Penn. 19103

ALAN G. CHOATE
PEPPER, HAMILTON
& SCHEETZ
123 South Broad Street
Philadelphia, Penn. 19109

Attorneys for
Alaska Bulk Carriers, Inc.
and
Trinidad Corporation.